NO. 80-180

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1980

W.C. McDANIEL, ET AL.,

Petitioners,

vs.

JOSE SANCHEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION

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Comes now the American Civil Liberties Union, through counsel, and moves the Court for leave to file a brief, amicus curiae, in support of the Respondents in the above-styled cause.[1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over two hundred thousand members dedicated to protecting the fundamental rights of the people of the United States.

1. Counsel for petitioners declined to consent to the filing of this brief.

The Union has long supported judicial and legislative efforts to prevent the dilution as well as the denial of the right to vote. Since 1964 the Union has maintained a Southern Regional Office which has operated a Voting Rights Project. In support of the Union's goals, attorneys in that office have and continue to litigate numerous cases involving the elective franchise under the Fourteenth and Fifteenth Amendments, and particularly the Voting Rights Act of 1965.

The case sub judice may have ramifications for other litigation in jurisdictions where the local governing body may seek to adopt at-large districts, on jurisdictions not covered by §4 of the Voting Rights Act of 1965, and counsel for the parties herein may not focus on such issues because it does not directly affect them. Additionally, amicus curiae will discuss §3 of the Voting Rights Act which has not as yet been addressed by the parties.

Because of the Union's concerns over equality in voting, and because counsel for the parties may not focus on the issues mentioned above, the Union seeks leave to file this amicus curiae brief.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus Curiae

The interest of amicus curiae, American Civil Liberties Union, is set forth in the motion for leave to file this brief, supra, p. ii.

Summary of Argument

When fashioning equitable relief where a Fourteenth Amendment violation has

been found in a voting apportionment case, the district court should first consider whether the state authorities have the legal authority to redistrict. Although the district court must provide the state authorities the opportunity to perform their redistricting function whenever practicable, if the state authorities are unable or unwilling to do so, consideration of equitable relief must not be limited to evaluation of a redistricting plan proposed by defendants. This allows undue influence to the factors chosen by defendants in formulating a plan where deference is not justified specifically because they failed to exercise and take responsibility for a legislative judgment.

The plan here was legislative because the defendants possessed the reapportioning authority, devised the plan encompassing their judgments, and informed the district court they would adopt it if permitted to do so. The district court erred in both setting and holding a hearing on the constitutionality of the plan. The judgment of the court of appeals was correct in ruling that the plan should have been submitted for pre-clearance under the Voting Rights Act of 1965, 42 U.S.C. §1973c.

In cases where the plan is court ordered and in cases where the jurisdiction is not covered by §4 of the Voting Rights Act, 42 U.S.C. §1973b, a reapportionment plan must not only be scrutinized for constitutional validity, but it cannot be enforced unless the district court or the Attorney General has determined under §3 of the Voting Rights Act, 42 U.S.C. §1973a(c), that the plan has no racial purpose or effect.

ARGUMENT

I.
THE PLAN HERE WAS LEGISLATIVE BECAUSE THE DEFENDANTS HAD THE LEGAL AUTHORITY TO REAPPORTION AND MADE THE DECISION TO ADOPT THE PLAN.

In determining whether a reapportionment plan is legislative or court ordered, two questions must be answered. First, do the state plan adopters, who in this case are the defendants, have the legal authority to adopt a legislative plan? Second, did they exercise their judgment, or was it the judgment of the district court, to adopt the plan?

A. Legislative Authority is Necessary.

Although Wise v. Lipscomb, 437 U.S. 535 (1978) does not sharply demarcate what is or is not a legislative plan, it did clearly hold that the authority to reapportion is critical.[1]

Here, there is no doubt that the defendants Commissioners' Court had the state authority to reapportion. Art. 5, Sec. 18 of the Texas Constitution provides for four single member districts and the authority

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1. Five justices rejected the proposition espoused in the opinion of Justices Powell, Burger, Blackmun and Rehnquist, that federal courts should accord constitutional deference to all reapportionment proposals by defendant political bodies without regard to whether those bodies had the legislative power to reapportion themselves under state law. The judgment of the Court was delivered by Justice White, joined by Justice Stewart. Part II of this opinion announces the rule that the defendant officials' proposed remedy should be treated with constitutional deference only if it is in fact a "legislative plan." 437 U.S. at 540. The opinion of Justice Marshall, joined by Justices Brennan and Stevens, agreed with Part II of the White opinion, 437 U.S. at 550, differing only as to whether or not the Dallas city council validly enacted the plan.

of the Commissioners to draw Commissioners' Court districts.

B. The Defendants Exercised Their Judgment in Adopting the Plan.

1. Whose judgment is imposed is the central issue.

Whether the judgment of the state authorized reapportioning body or the judgment of the district court was exercised is of critical importance. A simpler way of stating this factual question is--did the state authorized reapportioning body perform its duty or not. Resolution of the question is important because it affects what factors may be considered in adopting the plan and the burden of proof, the legal standards, and the forum to be used in validating the plan.

This Court has consistently mandated deference to legislative authorities in reapportionment matters because they and not the federal courts are best situated to identify and reconcile traditional state policies. Connor v. Finch, 431 U.S. 407 (1977). In performing its function, a state reapportioning body may constitutionally consider a variety of factors,

e.g., minimizing contests between incumbents, reflection of political party strength, experimentation with governmental forms, integrity of political subdivisions, compactness and contiguity of districts, natural and historic boundaries. Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Dusch v. Davis, 387 U.S. 112 (1967); Swann v. Adams, 385 U.S. 440 (1967); Burns v. Richardson, 384 U.S. 73 (1966). In an individual situation these factors may or may not justify certain district lines, but they do not in and of themselves establish invidiousness.

When a district court is faced with the task of devising and imposing a reapportionment plan because the legislative body is unable or unwilling to perform its responsibility, the court is bound to take into consideration many of these same factors.

> [I]n the context of legislative reapportionment, [a federal district court] should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the

> Federal Constitution, . . . White v. Weiser, 412 U.S. 783, 795 (1973).

Deference was due the factors in the state plan in White v. Weiser, though the plan itself was rejected, because it was duly enacted. Ibid. The district court should not "intrude upon state policy any more than necessary." Whitcomb v. Chavis, 403 U.S. 124, 160 (1971).

If compelled to fashion an apportionment remedy, a district court is limited in two ways differing from the reapportioning authority of a state. It must seek de minimus population variations and avoid the use of multi-member districts. Chapman v. Meier, 420 U.S. 1, 26-27 (1975).[1]

Most importantly, when fashioning a reapportionment remedy, the district court must act "in a manner 'free from any taint of arbitrariness or discrimination,' Roman v. Sincock, 377 U.S. 695, 710 (1964)"; Connor v. Finch, supra, 431 U.S. at 415.

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1. A state authority must, of course, also seek de minimus population variations, but may justify larger deviations "based on legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims, 377 U.S. 533, 579 (1964), quoted in Mahan v. Howell, 410 U.S. 315, 325 (197).

Responsibility for the reapportionment plan is the key to distinguishing a legislative plan from a court-ordered one. If the legislative body is unable or unwilling to perform its duty, the justification for deference to the state authority disappears. The responsibility is thrown to the district court which lacks "the political authoritativeness that the legislature can bring to the task." Connor v. Finch, supra, 431 U.S. at 415. This authoritativeness is lacking whether the legislative body completely fails to attempt to perform its duty, or whether it drafts a plan and tells the court it is unwilling to adopt the plan, and that the court may decide that this is the plan that should be adopted.

And, conversely, this authoritativeness is present when the legislative body drafts the plan, submits it to the court for a determination of its constitutional validity, and tells the court that if the plan is constitutional, the body will adopt it. Whether the formal adoption is before or after a determination of constitutional validity is of no consequence in deciding that the plan is

legislative rather than court-ordered.[1] The Court so ruled in Wise and this is the situation here.

2. The District Court in fact approved a legislative plan.

Defendants place great significance on the sentence of the district court's October 2, 1979 opinion by which they were "directed to submit a proposed new plan by the 13th of November, 1979." A-19.[2] They argue that this indicates that the plan was court ordered, and the district court apparently agreed with this argument. A-23.

There are two problems with this argument. First, the whole context of the October 2, 1979, opinion reveals that the district court was at that time directing that a time schedule be following during which time the defendants would be provided "a reasonable opportunity. . .to meet constitutional requirements by adopt-

1. Unless there is doubt, absent here, of the bona fides of defendants' expressed intent. The error in holding a hearing on constitutional validity on a legislative plan in a jurisdiction covered by §4 of the Voting Rights Act is discussed infra.

2. References to the petition for writ of certiorari appendix are cited as A-___; to the joint appendix as JA-___.

ing a substitute measure rather than for the federal court to devise and order into effect its own plan." This language from Wise v. Lipscomb, 437 U.S. 535 (1978), was quoted by the district court. Immediately thereafter, the district court said:

> If the Commissioners Court is unwilling or unable to present a proposed plan that will pass constitutional muster, it will then become the "unwelcome obligation" of the Court to do so. Connor v. Finch, 431 U.S. 407, 415. A-19.

In the very next paragraph of its opinion, the district court directed that new plan be submitted by a date certain and set a subsequent date "to determine the validity of the proposed new plan, . . ." Ibid.

This was the opinion in which the district court struck down the existing apportionment scheme. Earlier in the opinion the district court ruled:

> Defendants must therefore reapportion the current Commissioners Court precincts in order to bring the precincts in line with the one-man, one-vote principle. A-5.

That it was the defendants who should reapportion was reiterated later in the opinion, A-18, 19, in the Conclusion section, along with the above quoted direction to submit a plan.

Two conclusions must be drawn from these statements. The first is that the Section 5 submission issue was not being considered at that time. The second is that there is evidenced a presumption that the defendants would accept their responsibility and opportunity to reapportion themselves. The latter conclusion is inescapable. There is no indication in the record up to that point that defendants would be "unable or unwilling" to reapportion.

The second problem with the defendants' interpretation is that if the direction to submit a plan were to be interpreted as an indication that the district court was going to devise and impose its own plan, this was error, for this would have been a denial of the defendants' opportunity to perform their own responsibility. The more reasonable interpretation of the entire opinion is that the district court was providing that opportunity and explaining what would happen if the defendants failed to act.

But the district court confused the matter by setting a hearing date "to determine the validity of the proposed new plan." A-19. To hold hearings on a plan, which the court at that time could only presume

would be validly adopted by defendants, would be in conflict with Connor v. Waller, 421 U.S. 656 (1975). The logical construction of the district court's language is that it did not consider, at the time of this opinion, the holding of Connor v. Waller. It was instead intending to hold a hearing on the constitutionality of a reapportionment plan which it expected the defendants to devise and adopt.[1]

If the defendants have the state authority to apportion, and there is no indication they are unwilling to do so, directing them to exercise their authority cannot transform the plan they do adopt into a court ordered one. To construe the court's opinion in this manner would mean that when a district court directs defendants to perform their duty, and/or sets a deadline for that performance after

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1. The court directed a hearing on the plan which defendants were going to submit. It did not direct a hearing at which the court would choose a plan from several presented, or hear the arguments as to the validity of a court-devised plan. Nor did the court invite, much less direct, plaintiffs to submit a plan.

Furthermore, if the district court had properly directed defendants to seek pre-clearance prior to a hearing on the constitutional validity of the plan, the whole problem would not have arisen. Plaintiffs' rights under §5 cannot be denied because of the district court's error.

which the court will devise and impose its own plan, then even though the defendants perform their duty, it becomes a court ordered plan. Clearly this flies in the face of this Court's instructions that defendants are to be provided a reasonable opportunity to perform their function if practicable before a district court can act.

The district court's subsequent opinion of January 10, 1980, finding that the plan was not subject to pre-clearance because the "Commissioners Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order," A-23, is, unfortunately, not accompanied by any fact finding. While this opinion was issued after the issue had been joined as to whether or not pre-clearance was required (as the earlier opinion was not), it is no more enlightening as to the basis for the conclusion.

Defendants had not taken the position that they would refuse or were without authority to reapportion.[1] They at most

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1. They did not take an appeal from the earlier opinion which would then have been consistent with refusing to reapportion, intending to fight the finding of malapportionment on appeal.

indicated that they did not wish to reapportion, but if the court told them to do so they would rather do it themselves. JA-41, 42. While they may have failed to formally adopt the plan at the time of the hearing, the lead defendant testified that they would adopt it "if the Courts permits. . ." JA-40.

The evidence in the record thus shows only that they were willing to perform their legislative function, not that they were unable or unwilling to do so. They may have avoided their duties for ten years, preferring not to reapportion. But once the old plan was held unconstitutional, and defendants were provided the opportunity to perform their legislative function, they did so.

In deciding whether it was the court's or the defendants' judgment which shaped the plan, it is not sufficient solely to look at what factors shaped the plan. For example, Art. 5, sec. 18 of the Texas Constitution requires Commissioners' Court districts to be four in number, to be elected from single member districts and to have staggered terms. Certainly these factors are encompassed within the

plan. And if the court had drafted its own plan it would have been required to utilize these factors or explain why it did not. White v. Weiser, 412 U.S. 783 (1973). The mere utilization of state politics does not make this a legislative plan.

But this record overwhelmingly shows that it was the defendants' judgment about a number of factors that shaped the plan. They shifted the boundaries around the courthouse to protect the location of an office of an incumbent justice of the peace. JA-28, 35. At the direction of defendant McDaniel the plan was drawn "as much as possible along existing voting precincts. . .," JA-30, A-46. The commissioners' districts remained about the same outside the City of Kingsville, JA-35, and commissioner duties are confined largely to areas outside the city. JA-35, 36. "[E]ach commissioner examined [the plan] and of course they were interested in knowing how much came out of their precinct or how much went into their precinct. . ." JA-39. They preferred to redistrict themselves "rather than having Texas Rural Legal Aid come in and draw it for us." JA-42. They were aware of the

racial make-up of the districts under the plan. Judge McDaniel testified, "[Y]ou would naturally know, by living in Kingsville and living in Kleberg County, where the population lives and what the makeup is. . ." JA-43. And the plan drafter had similar knowledge. JA-32.

The legislative judgment here is indistinguishable in any meaningful way from Wise v. Lipscomb, 437 U.S. 535 (1978). In fact, indicia of legislative action is stronger here because there is no question of the necessity of a referendum. In both cases, an existing plan was held constitutionally defective and this was not appealed. Both defendants were provided the opportunity to submit a plan. Dallas drafted a plan and responded with a resolution that it would enact the plan by ordinance if the court approved the plan. The court orally approved the plan, the defendants did enact, and the court ruled in writing. While on appeal, the populace approved, providing the final, necessary or not, judgment of the persons in whom Texas law placed reapportioning authority.

The defendants here adopted a plan they had drafted for submission to the court for consideration of its constitu-

tional validity. Judge McDaniel was asked by his own attorney: "And you will adopt it if the Court permits you to do so?" He answered: "Yes, sir." JA-40. Presumably they followed up their expressed intent.

Nothing more could have been done to permit and in fact effectuate the legislative functioning of the body authorized by Texas law to redistrict. Like Wise v. Lipscomb, this was a legislative plan.

3. The decision to formulate and adopt a reapportionment plan and the decision of when it shall be implemented are separate questions.

To argue, as defendants suggest, that this plan is court ordered because the district court said the 1980 elections "should be conducted under this plan." A-23. ignores that dichotomy between adopting a plan and the timing of the implementation of the remedy. Situations arise in which a legislative body adopts a reapportionment plan, is required to receive §5 preclearance, but is subsequently unable to implement the plan for upcoming elections because of a conflicting interest expressed

in state law. A district court may then order the plan implemented immediately despite a particular state statute. This order may indeed not be subject to §5 pre-clearance under Connor v. Johnson, 402 U.S. 690 (1971), but it does not follow that the plan was not subject to pre-clearance.

This is the situation here. Defendants unquestionably had the authority under state law to reapportion commissioner precincts at any time. But, they argue, their plan altered election precincts which Art. 2.04.1., Texas Election Code, permits only during July or August.

The plan here split election precincts insofar as voting for commissioners, but it did not alter the precincts. Voters still were to go to the same polling place. JA-47, 48. Further, Judge McDaniel testified that voter registration cards which indicated voter precincts had already been mailed out to voters, JA-38, and whether or not a commissioner precinct split an election precinct, the voters would go to the same polling place. JA-48.

The purpose of Art. 2.04 was spelled out in Wilson v. Weller, 214 S.W.2d 473,

474 (Tex. Civ. App. 1948):

> If the statute be disregarded, confusion in election processes would result. The payment of poll taxes and the certifying of poll lists would be seriously interfered with. If election precinct lines could be changed immediately before elections, a virtual disfranchisement of voters might result. The purpose of this law is to prevent and not permit practices which tend to bring about uncertainty and disorder.

Texas law is thus concerned that changes in precinct boundaries may confuse the voters or result in their being omitted from poll lists. But a parallel concern was not deemed necessary to restrict the authority to redistrict commissioner precincts. It is significant that defendants did not even argue this statute as a basis for their lack of authority to reapportion until they filed their petition for rehearing in the court of appeals.[1]

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1. Defendants have not even argued that their action would be prohibited by Art. 2.04.2, which says that election precincts shall not be formed out of, inter alia, two or more commissioner precincts. For this statute, while stating this shall not be done, contemplates but that it may happen and limits the time in which it shall be corrected by redrawing election precinct lines. If

(Footnote continued on next page)

But even if defendants' position were correct that they could not do what they did to election precincts, they should have brought this to the district court's attention. The court could have inquired then as to whether or not a plan could be devised with acceptable deviations without splitting precincts. Instead the defendants made the legislative judgment, as Connor v. Finch, 431 U.S. 407, 415 (1977), says they should, that it was permissible and preferable to split an election precinct rather than to redraw the election precincts' lines. See, JA-48.[1]

A district court may, as part of the remedy, alter any number of election processes. It may reopen qualification dates, shorten terms, order special elections, etc., as the equities demand. But

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(Footnote continued from preceding page)
not corrected in September of the year, Texas law prefers that the election precincts continue to be split by a commission precinct in order to avoid confusion of the voters. This is exactly the circumstance that resulted here.

1. "The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." Connor v. Finch, 431 U.S. at 415.

to hold that because a single factor is altered, the whole nature of the adoption of a reapportionment plan is thus court ordered would defeat the intent of this Court in directing deference to legislative judgment to adopt an apportionment plan "whenever practicable." Wise v. Lipscomb, 437 U.S. 535 (1978). "Whenever practicable" did not mean "whenever in full adherence to every state election law." As long as the legislative body properly performs its legal authority in adopting a plan it remains legislative even though in order to provide relief a court may shorten deadlines, etc. In providing relief for a constitutional violation certain tangential state policies may be altered. Costello v. Wainwright, 430 U.S. 325 (1977). This is the circumstance found here.

II.

COURT APPROVAL OF A DEFENDANT DRAFTED PLAN UPON INQUIRY ONLY AS TO THE PLAN'S VALIDITY UNDER THE ONE-PERSON, ONE-VOTE STANDARD, ALLOWED UNDUE DEFERENCE TO THE PLAN IF IT WERE NOT LEGISLATIVE. IF A PLAN IS COURT ORDERED, AND PARTICULARLY IF THE DEFENDANTS' PLAN IS THE ONLY ONE CONSIDERED, SECTION 3 OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973a(c), REQUIRES THAT THE COURT SHOULD NOT ENFORCE THE PLAN UNTIL IT WAS FOUND TO HAVE NO RACIAL PURPOSE OR EFFECT.

A. By Inquiring into Only the One-Person, One-Vote Validity of a Defendant-Proposed Plan, the Court Gave Undue Deference to Judgments that Were Not Entitled to Deference Because They Were Not Legislative.

The record here reflects that the district court placed the burden of proving the constitutional, one-person, one-vote validity of the plan on defendants. Since it was their plan, this was undoubtedly correct. Sims v. Amos, 365 F.Supp. 215 (M.D.Ala. 1973)(three-judge court), aff'd, 415 U.S. 902 (1974). (See questions presented, Wallace v. Sims, No. 73-961, 42 U.S.L.W. 3426.) The placing of this burden of proof on defendants is a further indication that the district court actually

considered the plan legislative. But the burden of proof was not placed on defendants that they would have had to carry either before the Attorney General or the United States District Court for the District of Columbia, that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . ." 42 U.S.C. §1973c. The district court opinion defeats the purposes of Congress and was properly reversed.

It is plain that the district court erred by providing time for the defendants to perform their function and simultaneously setting a hearing to determine the constitutional validity of the results. Connor v. Waller, 421 U.S. 656 (1975). And if it were at that time contemplating a court ordered plan, it should not have directed only the defendants to submit a plan, for this not only denies the other parties an equal opportunity to be heard on the issue of remedy, but it provides deference to defendants' preferences when deference was not justified because they were unwilling or unable to exercise a legislative judgment. Additionally, the court's inquiry was subse-

quently limited to the one-person, one-vote issue (and perhaps the dilution issue), and did not reach the issues of whether or not a court ordered plan should encompass the priorities which the defendants here were allowed.[1]

Only state interests expressed in statutes or constitutional provisions, or validly adopted by a legislative body are entitled to deference when a court devises

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1. One example of what should have been inquired into will suffice. The general structure of the commissioners' districts remained unchanged, following closely the old election precincts and commissioners' districts. The old plan overloaded one district with minority population, leaving three districts overwhelmingly white dominated. This carried forward into the new plan. But in a county with a forty-seven percent (47%) minority population, it might have been possible to draw a plan where that population would control one district and have a fair chance at influencing the election in a second. A federal district court would not be free to blindly accept a plan where a forty-seven percent minority has a chance of influencing the election in but one of five offices for the governing county authority; it might well have adopted a plan in which the resulting political configuration more closely reflected the potential voting strength of the minority population. This might not have been possible, but it should have been considered in a court ordered plan.

and imposes a plan. White v. Weiser, 412 U.S. 783 (1973). If the district court were agreeing, and if this Court agrees that the plan was not legislative because the defendants did not properly enact the plan, then the deference to the plan (without consideration of the plans proposed by plaintiffs) was error.

This was especially error here where it appears that one reason, if not the primary reason, the defendants did not enact the plan formally until after the court decided the plan was constitutional, was to avoid the necessity of pre-clearance under §5. To contenance this practice defeats the congressional intent in enacting the Voting Rights Act.

The district court opinion here has the result of defeating the coverage and protection of the Voting Rights Act, and it does so in circumstances most egregious and susceptible to abuse.

By drafting a plan with their own priorities, defendants had everything to gain--exemption from §5 coverage--and nothing to lose. They were allowed to make the judgments this Court has said they were entitled to only if they take legislative action with authority to do so

and if they accept responsibility for the plan.[1] If the court were to enter its own plan, defendants would not lose the right to elect to implement at-large districts, for Texas law does not allow that. They had only to submit a plan with deviations which the court would find de minimus and they would escape the pre-clearance procedure.

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1. The issue is not whether or not judgments should be made, but who is entitled to make them depends on who is responsible for making them. Even a court ordered plan is never free of political ramifications, if not political considerations. The very act of drawing district lines will likely determine the political complexion of an area. As Gaffney v. Cummings, 412 U.S. 735, 753 (1973) pointed out, the political profile of an area is well known or available from public records, and political consequences are easily gleaned. At bottom, "politics and political considerations are inseparable from districting and apportionment." 412 U.S. at 753.

B. Section 3 of the Voting Rights Act, 42 U.S.C. §1973a(c), Requires that When a Fourteenth or Fifteenth Amendment Violation Has Been Found in a Voting Case, Even a Remedy Devised and Imposed by the Court Shall Not Be Enforced Until Either the Court or the Attorney General Determines that the Remedy Has No Racial Purpose or Effect.

Following Connor v. Johnson, 402 U.S. 690 (1971), Congress foresaw the potential avoidance of the standard of proving a change had no racial purpose or effect by amending §3 of the Voting Rights Act in 1975 to expressly cover lawsuits brought by aggrieved persons. Section 3 requires a finding that a plan does not have a racial purpose or effect despite lack of §5 coverage, whether coverage is absent because a plan is court ordered or because the jurisdiction itself is not covered under §4.

The third paragraph of §3 is reproduced in the addendum hereto. Upon finding a voting violation under the Fourteenth or Fifteenth Amendments (as opposed to a §5 violation), in addition to whatever relief it may grant the district court shall retain jurisdiction, and while

it retains jurisdiction "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced" until either the district court or the Attorney General determines that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

Section 3 is nationwide in application, so it serves other congressional goals as well. But one thing it does require is that any remedy imposed by a court must also be determined to meet the same standards imposed by §5. It does not require, consistent with Connor v. Johnson, 402 U.S. 690 (1971), a court ordered plan to be submitted under §5, and it allows a court ordered plan to be put into effect where defendants would take no action to adopt a plan or submit a plan under §5. But this non-discriminatory standard was so important that Congress required that district courts apply this standard even to court ordered plans as well as a constitutional standard of one-person, one-vote.

That it applies to whatever remedy the court orders is made clear by the omission from §3, as contrasted with the language in §5, that the change be one which the state or political subdivision shall "enact or seek to administer." No change, from the time of commencement of the lawsuit, shall be enforced without meeting the statutory standard of §3, whether the source of the change is the state or the court.

Section 3 has not been much litigated, but it completes a statutory structure in which Congress sought to remove from individual citizens the burden of establishing that voting law changes had a racially discriminatory purpose or effect. It avoids pitting a district court finding against an administrative finding by the Attorney General where a district court is attempting to fashion relief, as well as avoids a hiatus in the authority to fashion a remedy where defendants fall or refuse to secure pre-clearance under §5.

Conclusion

The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

Section 3 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973a:

(c) If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of

the voting guarantees set forth in section 1973b(f)(2) of this title. Provided, That such qualification, prerequisite, standard, practice or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

As amended Pub.L. 94-73, Title II, §§205, 206, Title IV, §§401, 410, Aug. 6, 1975, 89 Stat. 402, 404, 406.